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In the Supreme Court of the United States

October Term 1971

No. 71-1271

DON SCHNEIDER, SP-4, United States Army,
Petitioner,

vs.

MELVIN R. LAIRD, Secretary of Defense, The Pentagon, Washington, D.C.;
STANLEY R. RESOR, Secretary of the Army, The Pentagon, Washington, D.C.;
COLONEL MAX ETKIN, Commanding Officer, Deseret Test Center, Salt Lake City, Utah;
COLONEL CHARLES M. SHADLE, Commanding Officer, Dugway Proving Ground, Dugway, Utah,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Don Schneider requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 6, 1972.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Tenth Circuit dated January 6, 1972, is not yet reported and is printed in the Appendix to this petition at page A-1. The memorandum decision of the United States District Court for the District of Utah, affirmed by the Court of Appeals, is unreported and is printed in the Appendix to this petition at page B-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the standards and procedures established by Army regulations and applied by petitioner's commanding officer and the Department of the Army in refusing permission for on-post distribution of a newspaper prepared by petitioner unconstitutionally restrained petitioner's freedom of expression and freedom from prior restraint under the First Amendment?

(2) Whether the refusal by petitioner's commanding officer to provide petitioner any opportunity for hearing with respect to factual matters asserted as grounds for refusing permission for on-post distribution of a newspaper prepared by petitioner denied petitioner due process of law as guaranteed by the Fifth Amendment?

(3) Whether the standards and procedures applied by petitioner's commanding officer and the Department of the Army in refusing permission for on-post distribution of a newspaper prepared by petitioner failed to comply with the standards and procedures required by applicable regulations?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

(1) First Amendment, Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) Fifth Amendment, Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

(3) Army Regulation 210-10, paragraph 5-5 (as revised by change 1 dated 10 March 1969), is set forth at page C-1 of the Appendix to this Petition. Army Regulation 210-10 is a general Army regulation which "outlines the duties and prescribes the general authority and general responsibility of an installation commander" and is "applicable to installations in the United States and, where-appropriate, to overseas installations." (Paragraphs 1-1 and 1-2, Army Regulation 210-10.) Paragraph 5-5 of that regulation, entitled "Protection of loyalty, discipline and morale" authorizes and establishes standards for a commander's control of distribution of publications on his installation.

(4) Department of Defense Directive Number 1325.6 (September 12, 1969) is set forth in its entirety at page D-1 of the Appendix to this Petition. Its subject is "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces."

(5) Memorandum on the subject "Guidance on Dissent" by the Office of the Adjutant General, Department of the Army, dated 28 May, 1969, for distribution to all army commands is set forth in its entirety at page E-1 of the Appendix to this Petition.

STATEMENT OF THE CASE

In the Spring of 1970, petitioner, then a Specialist 4th Class, United States Army, prepared and published in compliance with applicable army regulations a newspaper of fact and opinion about army life and current politics titled the "Deseret Daisy." (The "Daisy.") Acting under Army Regulation 210-10, paragraph 5-5 (Appendix C, pages C-1 to C-3), petitioner's commanding officer, on insufficient grounds and without hearing, issued a written order that petitioner refrain from distributing the Daisy on post until review by the Department of the Army was completed. Despite several written requests for hearing, for clarifying guidelines, and for opportunity to make submissions on Departmental review, no opportunity to participate in any manner was ever proferred to petitioner.

After administrative review by the Department of the Army had consumed more than three months in spite of timely requests for expedition, this action was commenced on 10 September 1970 for mandatory and de-

claratory relief from the system of prior restraint established by the applicable regulations and from the orders refusing to permit distribution of specific issues of The Daisy. Jurisdiction was based on 28 U.S.C. § 1361 and 5 U.S.C. §§ 701-706. Just prior to hearing on a motion for preliminary relief, the Department of the Army reversed the commanding officer's determinations respecting the first two issues of the Daisy, but made no effort to clarify the standards applied or to ameliorate the system of prior restraints. When distribution of a subsequent issue was refused and similarly delayed on administrative review, petitioner brought on a motion for preliminary relief and for accelerated hearing on the merits. Three days prior to hearing, nearly two months after request to the commanding officer, petitioner was advised that the Department had affirmed the commanding officer, and was then first advised of the grounds for his determination, which included many disputable questions of fact. The District Court for the District of Utah heard the case on the merits, denied all relief and dismissed the complaint; and that action was affirmed *per curiam* by the United States Court of Appeals for the Tenth Circuit.

The incidents giving rise to this action began on 19 May, 1970, when petitioner first submitted a proper written request to his Commanding Officer at Dugway Proving Ground, Utah, requesting an appointment "for the purpose of obtaining his approval for the distribution of a new publication at Dugway Proving Ground" and offering for examination the first issue of the Daisy. On 10 June, 1970, petitioner again submitted a proper written request for "an appointment" with his Commanding Officer "concerning the distribution of the

'Daisy' on post through authorized channels." Similar written requests, including requests for hearing, for clarification of applicable standards and for opportunity to make submissions on any departmental review, were submitted on 11 and 16 June 1970.

On 25 May 1970, petitioner received a written order forbidding distribution of the first issue of the Daisy "until a final decision is received from the Department of the Army," based on a command determination that the Daisy "presents a clear danger to the discipline of the members of this command." The commanding officer grounded that determination on an editorial which had stated that:

> This paper has been fighting for its life and is waging a winning battle thanks to the overwhelming support of the enlisted men and a few of the more enlightened officers on post.

The determination was also based on a finding that the Daisy "contains language which is considered obscene and offensive to women and children and which affects the discipline of our troops," quoting the following from the first issue:

> I have heard from many of my fellow men that trying to solve a personal problem by following the army chain of command was almost as sensible as attempting to urinate up cross-braided hemp.

On 17 June 1970 petitioner received a similar written order refusing permission for on-post distribution of the second issue of the Daisy. The basis for that determination, as set forth in the order, was the use of the word "broads" in the second issue, referring to female

attendants at the post-exchange service station. The Commanding Officer reasoned that the word "broad" was "highly offensive" and "in bad taste" because its dictionary definition includes "a prostitute." Because the female service station attendants were wives of men under his command, the commanding officer found that "your inflammatory and disrespectful language clearly presents a danger to the discipline and morale of the members of this command, in that it offends and provokes the stated ladies and their aggrieved husbands."

In spite of a letter dated 1 July 1970, from petitioned's counsel to the reviewing authorities in the Department of the Army asserting petitioner's first Amendment rights and requesting prompt action in view of an impending discharge date, no response was received from reviewing authorities until shortly before the time set for hearing on petitioner's motion for preliminary injunction, on 28 September 1970. Petitioner was then informed that the Department of the Army had reversed the commanding officer's determinations with respect to the first two issues of the Deseret Daisy; and that reversal was confirmed by an order of the Department of the Army, a copy of which was provided to petitioner's counsel on 6 October 1970. The order of the Department of the Army determined that the language of the Daisy "does not appear to meet the test" of Army Regulation 210-10, paragraph 5-5, but offered no clarification of the standards or procedures to be applied.

On 16 October 1970, petitioner submitted a written request for permission to distribute the fourth issue of the Daisy. The Executive Officer, Dugway Proving Ground, responded in writing on 21 October 1970 that

the "proposed method of distribution is not clear" because petitioner had requested permission to distribute "through authorized channels." He found the words "authorized channels" to be ambiguous, despite the fact that previous requests had used similar phraseology and the fact that the Commanding Officer, on 6 October 1970, had advised petitioner of the manner of distribution that would be permitted in compliance with the reversal of his prior order by the Department of the Army.

On 3 November 1970, the Commanding Officer, without opportunity for hearing or other proceedings, advised petitioner in writing that his request to distribute the fourth issue of the Daisy had been forwarded to the Department of the Army, and that he was prohibited from making any distribution "pending receipt of a decision" from the Department. No explanation or statement of reasons for that action was supplied to petitioner at that time.

On 11 December 1970, three days before the date set for hearing on petitioner's renewed motion for preliminary injunction and accelerated hearing on the merits, petitioner's counsel was supplied with a written determination by the commanding officer that the fourth issue of the Daisy "presents a clear danger to the loyalty, discipline and morale of the troops," together with a written statement of reasons for that determination. Counsel was also then informed that the Department of the Army had affirmed the Commanding Officer's determination.

The reasons recited by the Commanding Officer for refusing distribution of the fourth issue of the Daisy related largely to some examples of "bad taste" which the

Commanding Officer found objectionable and a generalized fear that some statements would promote disloyalty or disrespect of officers and undermine discipline, or would interfere with harmonious relations between Army personnel and civilians assigned to Dugway Proving Ground. No specific incidents or problems arising from the Daisy or similar publications were asserted, and most of the Commanding Officer's stated objections depended heavily on his conclusions that specific statements in the fourth issue were false—conclusions subject to challenge if petitioner had been accorded some means of contesting the facts and the reasons for the order.

On 14 December 1970, a hearing was held on petitioner's motions for preliminary injunction and for accelerated hearing on the merits of his claims for mandamus and for declaratory relief. Petitioner had been released from active duty on 5 December 1970; but an associate in the preparation of the Deseret Daisy, Pfc. Randall Gibbs, testified that he had agreed with petitioner to distribute the fourth and subsequent issues if permission were obtained.

At the hearing, the Commanding Officer reasserted his previously-stated objections to distribution of the Daisy. Except for conclusory assertions that he applied the standards set forth in Army Regulation 210-10, he presented no evidence of the slightest danger or threat to the loyalty, discipline or morale of the men under his command. All of the commanding officer's objections were based upon his disagreement with facts asserted in specific articles in the fourth issue or his generalized fear that certain gibes directed at the President, officers,

noncommissioned officers or civilians employed on post would cause disloyalty or disrespect and might disrupt discipline. His testimony was heavily infected with his personal reaction to the material in the Daisy, which he characterized as "garbage."

On 29 March 1971, in a memorandum decision, the United States District Court for the District of Utah denied petitioner's prayer for preliminary injunction, declaratory relief and mandamus, and dismissed petitioner's complaint. (Appendix, pages B-1 through B-11) The United States Court of Appeals for the Tenth Circuit, on motion for summary affirmance, affirmed the District Court with a per curiam opinion on January 6, 1972. (Appendix, pages A-1 through A-5)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit intensifies the existing conflict among the Courts of Appeals respecting the extent of protection afforded free expression on military reservations and the appropriate scope of judicial review of military regulations and orders restricting free expression.

The present case provides an appropriately narrow basis for resolving many of the conflicting holdings and implications in the growing number of Courts of Appeals' decisions relating to the exercise of First Amendment rights on military posts. *Compare United States v. Flower*, 452 F.2d 80 (5th Cir. 1971) and *Dash v. Commanding General*, 429 F.2d 427 (4th Cir. 1970), *aff'g per curiam* 307 F. Supp. 849 (D. S.C. 1969), *cert.*

denied, 401 U.S. 981 (1971) *with Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970) and *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969). *See also Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. denied*, 401 U.S. 982 (1971); *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3317; and *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967).

The opinion of the Court of Appeals for the Tenth Circuit in the instant case is only the most extreme among a number of Circuit opinions which, in deference to a generalized command discretion, have applied a narrower and less intensive scope of review of military restrictions on free expression than is ordinarily applicable in First Amendment cases. Applying a "clearly erroneous" standard of review, the Tenth Circuit simply accepted the District Court's finding "as a fact" that the order prohibiting distribution of the Daisy was "reasonably" based upon its "perceived detrimental effect on the troop discipline, loyalty and morale." (App. p. A-4.) Similiarly, in rejecting petitioner's challenge to the vagueness and overbreadth of Army Regulation 210-10 and to the system of prior restraints imposed under it, the Tenth Circuit merely deferred to "the recognized peculiarities of the military community," "the established need of the commander to preserve his control" and "the context of the military environment." (App. p. A-3.) There was no apparent attempt at close analysis of the overbreadth and vagueness of the regulations or the speculative grounds offered by the commanding officer in support of his generalized fear that some material in the Daisy might undermine the "loyalty,

discipline and morale" of his troops. Nor was any thought given to confining the extreme prior restraints permitted by the regulation and reflected by the record in this case, despite the substantial foundation for such a ruling based upon petitioner's early written request to his Commanding Officer "to discuss the paper . . . and request under what terms and conditions distribution of the Daisy on post would be allowed."

In adopting the limited scope of review applied in the instant case, the Tenth Circuit relied upon *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970), and *United States v. Flower*, 452 F.2d 80 (5th Cir. 1971), both of which also emphasized the "wide discretion" of a military commander in restraining expression. 307 F. Supp. at 853; 452 F.2d at 85. Although not emphasized by the opinions in this case, similar views of the broad discretion of military commanders to restrain free expression, and the accompanying narrow scope of judicial review, are reflected in the decisions of the United States Court of Military Appeals. *United States v. Amick*, 40 C.M.R. 720 (Army Board of Review 1969), review denied, 18 U.S.C.M.A. 643 (1969); *United States v. Daniel*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970). See Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L.J. 325 (1971); Comment, "Military Discipline and Political Expression: A New Look At An Old Bugbear," 6 Harv. Civ. Rights - Civ. Lib. L. Rev. 525 (1971); Kester, "Soldiers Who In-

sult The President: An Uneasy Look at Article 88 Of The Uniform Code of Military Justice," 81 Harv. L. Rev. 1697 (1968).

In contrast, the Court of Appeals for the Seventh Circuit, in *Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir, 1970) demonstrated much less deference to command judgment and applied the more rigorous standard of review applicable in other First Amendment contexts. In reversing a summary judgment dismissing plaintiff's claims challenging her exclusion from Fort Sheridan, which had resulted from the Command's discovery of anti-war literature in her car on post, the Seventh Circuit rejected "a broad claim that undefined military and national defense coinsiderations are sufficient to permit the government to infringe plaintiff's rights to freedom of speech and association." 433 F.2d at 750. Examining the grounds offered in support of the exclusion order, the Court concluded that there was no evidence "that military discipline is actually affected by plaintiff's presence on the base or even by her antiwar activities." *Id.*

In analyzing the adequacy of the evidence of danger to military interests, the Seventh Circuit in *Kiiskila* departed from the "rational basis" review reflected in the above cases and applied the more stringent doctrine that purported justifications for invading First Amendment rights must be subjected to rigorous and independent judicial examination in order to avoid restraints based on "undifferentiated fear." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969).

Similar rigorous examination of evidence supporting a military restraint on expression is suggested in *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), where the Court emphasized, on remand, that the District Court should develop a complete record to determine "whether the Commanding General had a proper basis" for denying permission, under Army Regulation 210-10, for distribution of a newspaper published by servicemen. And in *United States v. Bradley*, 418 F.2d 688 (1969), the Fourth Circuit narrowly construed local post regulations in order to avoid First Amendment questions in reversing convictions for entering Fort Bragg without permission for the purpose of handbilling.

The latter cases clearly reflect a standard for judicial review of First Amendment matters more consonant with established constitutional doctrine. But the developing case law reflected by the instant case, *Dash v. Commanding General*, *supra*, and *United States v. Flower*, *supra*, demonstrates a trend toward much less rigorous examination of purported grounds for restraint of free expression by military authorities.

This Court should grant review in the instant case in order to harmonize these conflicting approaches to the fundamental right of free expression.

2. The decision of the Court of Appeals for the Tenth Circuit is in direct conflict with controlling decisions of this Court with respect to the application of First Amendment standards, the imposition of prior restraints and denial of right to hearing.

As argued in the preceding section of this petition, the limited "rational basis" scope of judicial review applied in the Tenth Circuit in reviewing the Commanding Officer's refusal to permit distribution of the Daisy seriously conflicts with First Amendment standards well established in this Court. Not only did the Tenth Circuit fail to provide the intensive review of evidence supporting restraints on expression required by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Gregory v. City of Chicago*, 394 U.S. 111 (1969); but it also totally failed to analyze the serious overbreadth and lack of adequate standards of Army Regulation 210-10, paragraph 5-5, on which the Commanding Officer relied. Yet in cases brought to the attention of the Tenth Circuit, this Court recently emphasized that restraints based upon apprehensions about "loyalty" implicate difficult questions of personal philosophy and political commitment which are beyond the competence of even the Congress or the President. *United States v. Robel*, 389 U.S. 198 (1967); *Schneider v. Smith*, 390 U.S. 17 (1968).

While there is the suggestion in *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969) that the overbreadth of that regulation can be narrowed by incorporating the standards elaborated in the Adjutant

General's memorandum of 28 May 1969, entitled "Guidance on Dissent" (App. pp. E-1 through E-9), 307 F. Supp. at 855, the Tenth Circuit made no effort to apply those standards or to require adequate findings. Similarly, no attempt was made to apply Army Regulation 210-10 in light of the standards and requirements of Department of Defense Directive No. 1325.6 of September 12, 1969 ("Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," App. pp. D-1 through D-5.).

In *Blount v. Rizza*, 400 U.S. 410 (1971), this Court recently reemphasized the heavy burden borne by prior restraints under the doctrine of *Freedman v. State of Maryland*, 380 U.S. 51 (1968), requiring that systems of administrative censorship be held invalid unless they are administered with "sensitive tools" including the following: (1) the government must bear the burden of initiating judicial review; (2) the government must bear the burden of proving that the material is unprotected expression; (3) judicial review must assure "a final judicial determination of the merits within a specfied brief period"; and (4) any restraint imposed in advance of a final judicial determination must be limited "to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution." 400 U.S. at 417. The record in the instant case demonstrates not only a failure to satisfy any of those requirements but an interminable administrative review process which effectively silenced the petitioner's newspaper. Yet the Tenth Circuit dismissed the prior restraint claim with a generalized reference to the special circumstances of the military. (App. p. A-3.)

Finally, the Tenth Circuit disposed of petitioner's due process claims without explanation, presumably on the basis of the generalized reference to *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), without any apparent recognition that the current decisions of this Court have emphasized that procedural due process requires some form of evidentiary process where official action is based on disputed facts. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). Yet, in the instant case, the Commanding Officer's determination refusing to permit distribution of the fourth issue of the Daisy was based on numerous disputable factual assertions which petitioner could have contested if his requests for hearing had been heeded and adequate notice of the grounds for the Commanding Officer's action had been supplied.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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